



May 2009

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Protecting Crews and Ships From Piracy by Arming Merchant Vessels for Self Defense

Background – Merchant Ships Have Historically Been Armed

The practice of arming merchant ships is longstanding. In colonial times, merchant ships carried cannons and weapons comparable to those found on naval vessels. Weapons were used by the crew to defend the ship and crew against attacks by pirates, privateers and enemy warships.

The fact that merchant ships could be armed without acquiring warship status was recognized in 1914 by the Department of State, provided the caliber of the guns carried did not exceed six inches, any guns and small arms carried were few in number, the quantity of ammunition was small, the vessel was manned by its usual crew, the cargo carried was not contraband and the ship was employed in normal trade routes.¹ In both World War I and II, naval weapons were placed on merchant vessels, manned by naval armed guards assisted by the crew or by the crew alone, depending upon the size of the vessel.

Recently, merchant vessels off the coast of Somalia have successfully employed nonlethal weapons such as long range acoustic devices (LRADs), stun and flash grenades, flares, small arms such as M-14 rifles, ideal for warning shots and disabling fire at a distance, and 12-gauge shotguns and pistols for repelling boarders and self defense.

The Right of Self Defense Under International Law

Under international law, merchant vessels and their crews have the right to carry arms for self defense if that is required for the vessel to exercise its freedom of navigation. Self-defense measures include providing weapons and training to the crew and/or hiring armed

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guards to allow the vessel to navigate. The self-defense measures and their employment should be proportionate to the threat.

The right of freely navigating the ocean, and of self-defense, of repelling force by force was common to both vessels [warship and armed merchant vessel]²; but every hostile attack in a time of peace is not necessarily piratical. It may be by mistake or in necessary self-defense or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the attack...³

This customary international law has been codified in the United States for US vessels and crews in 33 USCS § 383 "Resistance of pirates by merchant vessels":

The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same, and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.⁴

The basic freedom of navigation is a cornerstone of the United Nations Convention on the Law of the Sea (UNCLOS) (1982). UNCLOS includes 158 state parties. The United States, a UNCLOS signatory, has affirmed that it is customary international law to which the United States adheres.⁵

UNCLOS provides that all states and the vessels that fly their flags enjoy the freedom of navigation in the Exclusive Economic Zone (EEZ) and on the high seas. Within territorial seas, up to 12 NM from the coastal baseline, vessels enjoy the right of innocent passage. UNCLOS also requires all states to cooperate in the suppression of piracy.⁶

If pirates attempt to deprive vessels of their right to exercise the freedom of navigation, the shipowner and the crew may take reasonable steps to defend the vessel and the crew while in the exercise of freedom of navigation.⁷ These measures, as part of the vessel's legally required vessel security plan,⁸ may involve security guards and outfitting lethal and nonlethal weapons, fittings such as razor wire and armor, and equipment, as well as training crew members in the use of lethal and nonlethal measures in self defense.

Under international law warning shots do not constitute a use of force.⁹ A failure of the vessel to heed warning shots or other oral warnings justifies firing into the vessel's rudder or propeller area/outboard engine if warning shots and oral warnings go unheeded.¹⁰

While these measures are not restricted outside of territorial seas, within territorial seas, to enjoy the right of innocent passage, the merchant vessel should not exercise or practice with weapons of any kind or undertake any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state.¹¹

Flag State Requirements

The flag State of a vessel may promulgate requirements or restrictions on the use of weapons by merchant ships at sea. In the case of the United States, the US Coast Guard requires that US flag vessels sailing in waters infested with pirates operating out of Somalia carry guards in addition to US Coast Guard-approved vessel security plans to avoid, defend and deter pirate attacks.¹² These measures can include the training and arming of the ship's crew and guards with lethal and/or nonlethal weapons and the use of guards during the time the vessel is at risk of pirate attacks. US flag vessels that do not comply with these requirements are in violation of US Coast Guard requirements. In practical terms, the vessel owner will be exposed to serious legal consequences in the event of a pirate attack if the vessel owner has not complied with flag State requirements and taken prudent steps to meaningfully implement and actively monitor and exercise the US Coast Guard's anti-pirate measures.

For vessels registered in other nations, the law of the flag should be consulted. But generally few (if any) flag States restrict merchant vessels and crews from exercising their right to self defense while navigating outside of territorial waters. Shipowners that do not have an updated vessel security plan, approved by the flag State, and have not recently exercised this plan in view of today's pirate threats including reasonable measures to prevent, evade and defend against pirate attacks, may be civilly liable to crew members, passengers and cargo interests for injuries and losses caused by pirates by providing an unseaworthy ship for the known peril of piracy reported in certain waters. The standard of care in these situations is what a prudent shipowner would do in similar circumstances. Given the known danger of pirates off the coast of Somalia, it is unwise for a vessel owner to allow a ship to enter these waters without means to deter, defend itself or get timely and effective help from pirate threats. This is especially true for vessels that elect not to participate in naval convoys or use a private armed escort vessel where an escort response is available within 10 to 15 minutes between the time the crew sounds an alert that pirates are approaching and when pirates have boarded the vessel.

Port State Requirements

Port States may restrict the use of weapons by crews of foreign flag ships while in port. The presence of weapons should be specifically provided for in the vessel security plan approved by the flag State. In these cases, it is recommended that any weapons aboard ship for self

defense be unloaded and securely stowed and locked below decks under the supervision of the master while the ship is in port or entering or leaving territorial seas during a port call. In this fashion, there is little basis for a port State to consider the vessel as constituting a threat to the peace, security, and good order of the port State. If the security situation poses a risk to the ship and its crew in a given port, local security guards should be hired after liaison with the port State authorities.

Deadly Force and Other Considerations

Shipowners must carefully evaluate the decision to arm crew members and hire armed guards. Crew members require instruction in avoiding and deterring pirate attacks and must receive training in the safe use of small arms, including the use of deadly force.

On the same note, the use of armed guards requires careful evaluation of the company providing these services. Armed guards with no experience in working with merchant vessels and crew members in security situations may not be the best choice. Rather, a company with a track record that combines not only military but merchant marine experience is likely a better choice.

Use of small arms by crew members or armed guards necessarily raises the issue of deadly force. Deadly force is force that the person employing it knows or should know creates a substantial risk of causing death or serious bodily harm. Deadly force may only be employed when lesser means have failed or are not reasonably available, and a person reasonably believes that a person poses an imminent threat of death and serious bodily harm to crewmembers on the vessel. Deadly force should be employed only after lesser means of stopping or dissuading the hostile person (such as warning shots) have been exhausted. Personnel must be aware that the use of deadly force will be subject to scrutiny and can subject them to prosecution or potential civil liability particularly in the territorial seas of another country.

Part of any security plan should include an evaluation of the vessel security plan in light of flag and relevant port State requirements and international law. Clients turn to Squire Sanders' [maritime practice](#) for these services. Squire Sanders' practice scope is comprehensive – our lawyers advise on casualties and contracts, public international maritime law issues involving submarine cables, and intermodal transportation and terminals. We regularly negotiate and review maritime and logistics contracts and are experienced in marine transport regulatory issues and government and maritime security. We also consult and advise on financial issues arising in the maritime context, ranging from vessel financing to maritime bankruptcies and workouts including lien resolution. For further information on maritime self defense and security please contact your principal Squire Sanders lawyer or one of the individuals listed in this alert.

¹ Department of State file 763.72111/226a: 1914 for Rel Supp. 611-

612.1.

² *The Mariana Flores*, 24 U.S. 1,15; 11 Wheat 1 (1826).

³ *Peter Harmony and Others, Claimants of the Brig Malek Adhel v. The United States, et al.*, 43 U.S. 210, 236 (1844).

⁴ *Id.* at 230,-231.

⁵ US Government Publication, "19 Weekly Comp. Pres. Doc.," Mar. 10, 1983.

⁶ UNCLOS, Articles 100-101.

⁷ 33 USCS §383; 61 Am.Jur 2d Piracy § 11, 10 USCS § 351

⁸ Maritime Security Directive 104-6(rev. 2); 33 C.F.R. 104.400; NVIC 10-02(Chapter 10) and International Ship and Port Facility Security Code (ISPS) (December 2002).

⁹ *The Commander's Handbook on the Law of Naval Operations*, Edition July 2007 at 3-16.

¹⁰ *Ibid.*

¹¹ UNCLOS, Article 19.1 and 19.2 (a)(b).

¹² US Coast Guard Press Release dated May 17, 2009 "Coast Guard Issues Maritime Security Directive" *Reuters [Maritime Security Directive 104-6 (rev.2)]*; May 12, 2009 "U.S. Ships Must Post Guards When Sailing Off Somali"; *Lloyds List*, May 14, 2009, p. 2 "U.S. Flag Ships Off Somali Required To Have Guards."

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2009

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